Supreme Court, U.S.
FILED
JAN 15 1992
OFFICE OF THE CLERK

No. 91-1027

In The

Supreme Court of the United States

October Term, 1991

DIANE L. WALDRON-SHAH,
Petitioner,

v.

BOARD OF RETIREMENT OF THE LOS ANGELES COUNTY EMPLOYEES' RETIREMENT ASSOCIATION,
Respondent.

On Petition For A Writ Of Certiorari to
The Court of Appeal of the State of California

Brief In Opposition

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QUESTION PRESENTED

Does the United States Supreme Court have jurisdiction to issue a writ of certiorari to the state court where the federal questions asserted in the petition for writ of certiorari were not raised until after the state appellate court filed its decision and no state court considered the issues?

SUBJECT INDEX

TABLE OF AUTHORITIES iii

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION . . . 5

LAW 6

ARGUMENT 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Cardinale v. State of Louisiana,
394 US 437, 89 S.Ct. 1162 (1969) 6

Cox Broadcasting Corp. v. Cohn,
420 US 469, 95 S.Ct. 1029 (1975). 7

Edwards v. Elliott,
88 US 532, (1874) 11

Ernst v. Searle,
218 Cal. 233, 22 P.2d 715 (1933) 8

Gates v. Illinois,
462 US 213, 103 S.Ct. 2317,
reh den 104 S.Ct. 33 7

Johnson v. United States,
426 F.2d 651, (C.A.D.C., 1970) 12

McGarrity v. Delaware River Bridge Commission,
292 US 19, 54 S.Ct. 565 (1933) 7

People Ex Rel. Department of Public Works v. Mascotti,
206 Cal.App.2d 772,
23 Cal.Rptr. 846 (1962) 9

Rankin v. Frebank Co.,
47 Cal.App.3d 75,
121 Cal.Rptr. 348 (1975) 11

Russell v. Southard, et al.,
12 Howard 139, 159, (1851) 11

Sommer v. Martin,
55 Cal.App. 603,
204 P. 33 (1921) 8

Williams v. Georgia,
349 US 375, 75 S.Ct. 814 (1954) 8

Statutes and Rules

28 USC section 1257 ..... 1, 11

Supreme Court Rules,
Rule 12.5 12
Rule 14.1(h) 12

JURISDICTION

The Supreme Court lacks jurisdiction to consider a petition for writ of certiorari to a state court where the federal issues were not raised until after the state court filed its decision. 28 USC, section 1257.

STATEMENT OF THE CASE

The respondent is the Board of Retirement (hereinafter "the Board") of the Los Angeles County Employees' Retirement Association. The Association is a legal entity created under the authority of California Government Code sections 31450, et seq., entitled "County Employees' Retirement Act of 1937." Its purpose is to provide a retirement benefit program for employees of counties within the State, such as the County of Los Angeles, upon adoption by the county's Board of Supervisors.

The petitioner (hereinafter "Waldron-Shah") was

employed by the County of Los Angeles for approximately two and a half years in the late 1960s and by virtue of her employment, she was a member of the Association.

Waldron-Shah's case is accurately set forth in the opinion of the state Court of Appeal contained in the petitioner's Appendix I, at pages 1-21. In substance, Waldron-Shah's medical problems rendered her incapacitated for her duties with the County. She claimed retirement benefits on the basis that her incapacity was due to job-related injuries and her claim was denied in an administrative proceeding. Using his independent judgment on the evidence, the trial court reviewing the administrative decision found that Waldron-Shah's incapacity was not job-related. On appeal the Court of Appeal of the State of California affirmed the trial court's decision.

The petitioner's Statement of the Case sets forth allegations of malfeasance by the Board and others and contentions that the process of administrative mandamus in the State of California violates rights protected by the Constitution of the United States. Those allegations and contentions were not presented to the state trial or appellate courts prior to the filing of the decision of the Court of Appeal of the State of California. Following the filing of the decision of the Court of Appeal, Waldron-Shah filed *pro se* a petition for rehearing before that court, claiming, among other things, that the Board had destroyed records, hid files of materials which had previously been entered into evidence, withheld from Waldron-Shah information about procedures available to her, lied to her concerning her rights, hired referees to serve the Board's interests to find against her, drove lawyers from practicing before it,

controlled the content of transcripts and coerced experts concerning their testimony.

She also alleged in her petition for rehearing before the state Court of Appeal that she had been denied her right to a jury trial and her right to equal protection of laws.

These claims made in the petition for rehearing were not made before the trial court or before the Court of Appeal.

The petition for rehearing was summarily denied. Waldron-Shah filed a petition for review before the Supreme Court of the State of California. The petitioner expanded on the issues she had raised for the first time in her petition for rehearing. She alleged in her petition for review that the Board had destroyed evidence, conspired with its referees to conceal and misrepresent the contents of many documents concerning her claim,

and perpetrated a fraud on the state courts. Further, the petitioner claimed that the Board "interfered with the integrity of the transcript" of the administrative hearing, and committed fraud in keeping evidence out of the record.

Waldron-Shah also alleged violations of her rights to due process, equal protection and a jury trial.

The Supreme Court of the State of California summarily denied the petition for review. (Appendix I, page 82)

The petitioner has filed a petition for writ of certiorari before this Honorable Court.

REASONS FOR DENYING THE PETITION

The Supreme Court of the United States has no jurisdiction to review the decision of the Court of

Appeal of the State of California where Waldron-Shah did not raise any federal issue until after the Court of Appeal had issued its decision.

LAW

The Court held in Cardinale v. State of Louisiana, 394 US 437, 438-439, 89 S.Ct. 1162 (1969),

> "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions...
>
> "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their

constitutionality."

Accord, Gates v. Illinois, 462 US 213, 221-224, 103 S.Ct. 2317, reh den 104 S.Ct. 33.

If the state court actually entertains the federal question and rules on it, the issue will be preserved even though the issue was raised for the first time by way of a petition for rehearing and even though, apart from the state court's actually considering it, the issue would not have been preserved. Cox Broadcasting Corp. v. Cohn, 420 US 469, 476, 95 S.Ct. 1029 (1975).

However, where no federal question was raised in the state court prior to a petition for rehearing and the petition for rehearing "was denied without more", the federal question cannot be properly presented to the Supreme Court of the United States. McGarrity v. Delaware River Bridge Commission, 292 US 19, 20, 54 S.Ct. 565 (1933). Timely assertion of the federal claim

must appear in the record. Ibid.

A state procedural rule which forbids the raising of federal questions at late stages in the case has been recognized as a valid exercise of state power. Williams v. Georgia, 349 US 375, 383, 75 S.Ct. 814 (1954).

In California, "[t]he rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." Ernst v. Searle, 218 Cal. 233, 240-241, 22 P.2d 715 (1933)

In Sommer v. Martin, 55 Cal.App. 603, 610, 204 P. 33 (1921) the court stated,

> "The law casts upon the party the duty of looking after his legal rights and of calling the judge's

attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal."

Issues raised for the first time in a petition for rehearing before the California Court of Appeal will not be considered. People Ex Rel. Department of Public Works v. Mascotti, 206 Cal.App.2d 772, 780, 23 Cal.Rptr. 846 (1962).

ARGUMENT

The statement of decision of the trial court shows that at issue presented to it was whether Waldron-Shah's disability "...has been shown to be service-connected according to applicable legal standards..." (Appendix I, page 22)

The opinion of the Court of Appeal of the State of California shows that Waldron-Shah's contentions on appeal were that "...she is disabled due to conditions other than Lupus, the trial court's finding is not supported by substantial evidence, and the weight of the evidence establishes her disability is service connected." (Appendix I, page 13)

No federal questions were raised.

Waldron-Shah alleges in her petition for writ of certiorari (pages 30-31), and refers to a letter to her attorney (Appendix II, pages 24-25) which indicates, that she urged her attorney to allege before the trial court the various Constitutional issues she now raises before this Court. The attorney did not do so.

Waldron-Shah thus admits that she was cognizant of the federal issues at the time the case was before the trial court and the issues were not raised. The issues

were waived and cannot properly be asserted for the first time after the state appellate court filed its decision.

The petitioner has not satisfied 28 USC section 1257's prerequisites to the United States Supreme Court's jurisdiction to grant a writ of certiorari to a state court. The state courts were not in a timely manner presented with, and did not consider or decide, any federal issue.

In addition, Waldron-Shah alleges that her constitutional right to a trial by jury has been violated. The right to a jury trial under the Seventh Amendment has not been made applicable to the states. Edwards v. Elliott, 88 US 532, (1874); Rankin v. Frebank Co., 47 Cal.App.3d 75, 91-92, 121 Cal.Rptr. 348 (1975). No substantial federal issue is presented on that point.

Finally, the petition for writ of certiorari is limited to the case as it appears in the record. Russell

v. Southard, et al., 12 Howard 139, 159, (1851); Johnson v. United States, 426 F.2d 651, 656, n. 8 (C.A.D.C., 1970); See Supreme Court Rules, Rule 12.5 and 14.1(h). The allegations Waldron-Shah makes in her petition for writ of certiorari, and on which she basis her claim that there are federal issues in this matter, were not made and were not established in the state courts.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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